Petition

81-1090

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NO.

IN THE

Supreme Court of the United States

October Term, 1981

JANET RENO, State Attorney, and
JIM SMITH, Attorney General

Petitioners,

vs.

MICHAEL ABRAMS and SERGIO BENDIXEN, as members of the Democratic Executive Committee for Dade County, Florida,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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BRIEF OF PETITIONERS ON JURISDICTION

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QUESTION PRESENTED

WHETHER THE STATE OF FLORIDA MAY PROTECT THE INTEGRITY OF ITS PRIMARY ELECTIONS SYSTEM BY PREVENTING ITS OFFICIAL EXECUTIVE COMMITTEE FROM ENDORSING PRIMARY CANDIDATES IN PRIMARY ELECTIONS, WHERE SAID EXECUTIVE COMMITTEES ARE THE OFFICIAL LIASON BETWEEN THE STATE OF FLORIDA AND THE POLITICAL PARTIES AND THE EXECUTIVE COMMITTEES ARE IN STATUTORIALLY CREATED POSITIONS AND THE EXECUTIVE COMMITTEES ARE SUBSTANTIALLY FUNDED BY THE STATE OF FLORIDA.

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PREFACE

The Petitioners were the Appellants in the United States Court of Appeals and the Defendants in the trial court. The Respondents were the Appellees in the Court of Appeals and the Plaintiffs in the trial court. In this Petition the parties will be referred to as they appear before this court.

The following references are made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this court, which are contained in the Petitioners' Appendix and consist of page A1-A32.

I.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida is reported at Abrams v. Reno, 452 F.Supp.1166 (S.D. Fla. 1978). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at Abrams v. Reno, 649 F.2d 342 (5th Cir. 1981). There are no official reporters for citation to these opinions.

II.

JURISDICTION

.The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3) and Amendments I and XIV of the United States Constitution.

III.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment I of the Constitution of the United States provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV of the Constitution of the United States provides that:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 103.091(6) Florida Statutes provides that:

> "No State Executive Committee or County Executive Committee of any political party or any committee established by a State or County

Executive Committee shall endorse or oppose any candidate of its political party seeking nomination in any primary election. Nothing herein shall prohibit an individual member of a State Executive Committee from independently endorsing or opposing a candidate of his political party seeking nomination in any primary election, provided that such endorsement shall in no way indicate the member's position on, or connection with, the State or County Executive Committee."

IV.

STATEMENT OF THE CASE

On April 13, 1978, both houses of the Florida Legislature passed Section 103.091(6), Florida Statutes (1978). On April 14, 1978, the Governor of Florida signed the statute and it became law. Section 103.091(6) provides that:

> "No State Executive Committee or County Executive Committee of any political party or any committee established by a State or County Executive Committee shall endorse or oppose any candidate of its political party seeking nomination in any primary election. Nothing herein shall prohibit an individual member of a State Executive Committee or a County Executive Committee from independently endorsing or opposing a candidate of his political party seeking nomination in any primary election, provided that such endorsement shall in no way indicate the member's position on, or connection with, the State or County Executive Committee."

On April 15, 1978, the first of four "mini-conventions" scheduled by the Dade County Executive Committee was to take place. The Respondents,

Michael Abrams and Sergio Bendixen, both members of the Dade County Democratic Executive Committee, filed a civil rights complaint in the United States District Court for the Southern District of Florida requesting declaratory relief and permanent injunction. The State never sought to enforce the statute against anyone. After a hearing on April 14, 1978, the Respondents' motion for a preliminary injunction was granted. Pursuant to a notice of hearing the Office of the Attorney General filed a motion to intervene and defend the constitutionality of Section 103.091(6). After a hearing on April 21, 1978, the United States District Court issued a corrected memorandum declaring Section 103.091(6) Florida Statutes, unconstitutional. See, Abrams v. Reno, 452 F.Supp. 1166 (S.D. Fla. 1978).

On May 17, 1978, a status conference was held. The respondents' attorney's motion for attorneys fees and supporting memorandum was filed on that date. An affidavit in due course was subsequently filed on May 30, 1978 and July 6, 1978. Affidavits of attorneys fees were subsequently filed on June 14, 1978. The Petitioners filed a motion in response and opposition to the Respondents' motion for attorneys fees. An order granting attorneys fees in the amount of $2,500 plus costs was issued on September 16, 1978.

Pursuant to a stipulated motion for entry of final judgment was entered on October 28, 1978. The trial court however sua sponte, amended the attorneys fees award to $4,000. The Petitioners challenged the amendment of attorneys fees award on November 2, 1978.

On appeal to the United States Court of Appeals for the Fifth Circuit after briefs and argument the Court adopted the opinion of the trial court, reported at Abrams v. Reno, 452 F.Supp. 1166 (S.D.Fla. 1978).

The trial court found amids substantial publicity, that Section 103.091(6), infringes upon the personal and individual freedom of speech and that it infringes upon the Respondents individual right of freedom of speech without a showing of compelling state interest. See, Abrams v. Reno, 452 F. Supp. 1166 (S.D.Fla. 1978).

On August 20, 1981, the Circuit Court below denied the Petitioner's motion for rehearing and motion for rehearing en banc. A31. The Circuit Court however stayed its mandate pending review in this Court.

V.

SUMMARY OF ARGUMENT

The present statute, Section 103. 091(6) Florida Statutes, presents no restrictions upon freedom of speech for individuals or groups, but only restricts the personal use of an official State position and title. State officials are subject to regulation in the same manner as other officials under the Federal Hatch Act. See, 5 U.S.C. §1501-1508; 7321-7327. The State has a compelling interest in limiting the use of its official offices from politically manipulating its State primary elections.

The award of attorney's fees was clearly improper and excessive. There was absolutely no record justification for the trial court virtually doubling the attorneys fees on the trial courts own motion.

VI.

ARGUMENT

The trial court and circuit court have manifestly failed to apply proper statutory and constitutional analysis in finding that Section 103.091(6) Florida Statutes is unconstitutionally vague and overbroad. In St. Martin Evangelical Lutheran v. South Dakota, ___U.S.___, 101 S.Ct. 2142 at 2147 (1981), the court explained that:

> "A statute of course is to be construed if such a construction is fairly possible to avoid raising doubts of its constitutionality. [Citations omitted]."

Similarly, In Schad v. Borough of Mount Ephraim, ___U.S.___, 101 S.Ct. 2176, at 2183, n.7 (1981), the Court furthermore explained that:

> "Even where a challenged regulation restricts freedom of expression only incidently or in a small number of cases, we have scrutinized the governmental interest further by the

> regulation and have stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on freedom of expression. [Citations omitted]."

The present statute could not be more narrowly drawn or clear in its precise scope and prohibitions. Section 103.091(6) when properly and narrowly construed simply prohibits State and County Executive Committees and persons from using position titles connected with said committees from endorsing selected partisan political candidates for the primary election.

In Broaderick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), the state statute prohibited state employees from engaging in partisan political activities under the guise of their state employment. As in the Case at bar, the defendants in Broaderick had claimed that the languate of the state statute

was unconstitutionally vague and over-broad. In rejecting such a claim the Broaderick court explained that:

> "Whatever other problems there are with § 818, it is all but frivolous to suggest that the section fails to give adequate warning of what activities it proscribes or fails to get out "explicit standards" for those who must apply it. . . . Words inevitably contain germs of uncertainty and, as with the Hatch Act, there may be disputes over the meaning of such terms in § 818 as "partisan," or "take part in," or "affairs of" political parties. But what was said in Letter Carriers, supra, 413 U.S., at 578-579, 93 S.Ct., at 2897, is applicable here: "there are limitations in the English language weith respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." Moreover, even if the outermost boundaries of § 818 may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the

> "hard core" of the statute's proscriptions and appellants concede as much. "[footnote omitted]."
>
> 413 U.S. at 608.

As in Broaderick, the present statute is unmistakably clear and applies precisely to the Respondents. It is neither vague nor overbroad within the meaning of Broaderick v. Oklahoma, and the proper statutory analysis noted in St. Martin and Schad.

Furthermore, the State has a lawful and legitimate right to provide the limited restraint upon the State Executive Committees, which it created, consistent with its compelling state interest in official neutrality in primary elections. The comprehensive statutory structure from which the State Executive Committee is derived is in fact the compelling reason why the federal courts should not interfere with the State

regulation of its own officials. The State Executive Committee is created by Section 103.091(1) Florida Statutes. The County Executive Committee is similarly established by statute in accordance with the rules of the State Executive Committee. See, §103.091(1) Fla. Stat. The State Executive Committee was created as a state representative for the political parties. Id. The Florida Statute provides for the composition of the County Executive Committees in the absence of a party rule. The Statute also provides for the method of selection of members of the State or County Executive Committee. See, §103.091(4) Fla. Stat. The Statute specifically provides for the method for filling vacancies. Section 103.121(1) Fla. Stat.

The powers and duties of the Executive Committees are particularly defined by statute. §103.121(1) Fla. Stat. In particular, the main power and duty conferred upon Executive Committees is the power to make party nominations when required by law and to levy party assessments not to exceed two percent of the annual salary sought by the respective candidates. See, §103.121(1)(d)(g) and (3), and §99.092(1) Fla. Stat. Eighty five (85) percent of the filing fees of the candidates in a primary election which are collected by the Department of State must be sent to the State Executive Committees no later than thirty days prior to the primary See, §99.103(1) and (2). The amount of the filing fee is three percent of the annual salary of the office a candidate is seeking to qualify for nomination or election.

§99.092 (1)(b)(3). A violation of this oath of office may subject a County or State Executive Committee person to removal from office by statute. §103.141 and 103.151. Finally, the chairman and treasurer of an executive committee are jointly accountable and libel for the proper expenditure of the funds and must furnish bond to the State of Florida for faithful performance. §103.121(3) Fla.Stat.

The Petitioners submit that it is incorrect to suggest the State cannot limit such State organizations in their limited and narrow fashion as it does under the instant statute. The Petitioners emphasize that the statute in question does not prohibit an individual member of a County or State Executive Committee from making personal endorsements using the name of the party. The statute also

does not prohibit the rank and file of any political party from collectively endorsing a candidate. Simply stated, the United States District Court below and the Circuit Court have proper and narrow construction of the State Statute in order to sustain its presumptive constitutionality. Both the trial court and the circuit court have overlooked the substantial State nexis in the Executive Committees. The State has only done herein that which the court in Broaderick has plainly said it can do.

Furthermore, Florida has a compelling state interest in protecting the integrity of the primary system by insuring the official neutrality of the State Executive Committees before the party voters pick candidates to represent the party in a general election. The foundation of the primary process in Florida was explained by the Court in Knott v. Haskell, 72 So.651 (1916), where the Court in rejecting an argument that the Court could not compell primary elections officers to correctly perform their duties, explained the primary process thus:

> "For the Court to adopt any other construction would be to deny a candidate his rights arising under the primary election laws and render the primary election law a means for the election of candidates by inspectors of election instead of by ballots of party members and place

> into the hands of the professional politician and instrument for controlling party nominations, thus frustrating the sole reason for a primary election law."[Emphasis added].

Similarly, in Cavanaugh v. Morris County Democratic Committee, 297 A.2d 584 (N.J. 1972), the Superior Court of New Jersey also explained that:

> "At one time party conventions provided the party nominees. However, because of political dissatisfaction with the political manipulation at conventions, primaries have replaced the convention procedure. See, Ray v. Blair, 343 U.S. 214, 72 S.Ct. 654, 96 L.Ed. 894 (1952). The major reason for changing to the primary election is to prevent political manipulation by certain select members of the party."[Emphasis added].

The New Jersey Statute in question, provided that:

> "No State County or Municipal Committee of any political party shall prior to any primary election endorse the candidacy of candidate for a party nomination or position."

It is common knowledge that political machines have thrived in major cities by controlling primary elections. In major cities in this country the outcome of a primary election has not been in doubt once the political bosses have made their selections with official government blessing. In Florida, the State has successfully prevented "political bossism". Instead, the State has a deep seated interest in providing for pure democracy in a primary election. In a primary election in Florida, the candidate should be freely presented without official State persuasion or preference.

The executive committees are the official liason between the State and the political party and are a statutorially funded by the State of Florida.

The Petitioners submit that the statutory status created by the Legislature and conferred upon the executive committees, justifies the minimal state control imposed upon the use of an official state position, which is itself a creature of the statute. Unlike political parties in general, which are not inhibited in endorsements, see, Section 106.144, the State and County Executive Committees are governmental bodies enjoying official status. A County Executive Committee is substantially a governmental function in the electoral process. In particular, in Florida, the State Executive Committeemen take an oath of office as any State officer and have powers and duties conferred upon them by Statute and are personally accountable for the fiscal integrity of

the political parties and have the power to tax and assess party candidates. Their position title gives the Respondents a role as administrative liason between the State and the political parties.

The effect upon the primary system in sustaining the Respondents position herein is substantial. Permitting Executive Committees to use the position of Executive Committee as platform for personal endorsements even prior to the qualifying date for candidates running for office acts as a chilling effect upon any other candidate in the exercise of their rights to access to public office. Certainly this Court is aware that people do vote straight party tickets no matter who is running. More importantly, what is the effect upon

unannounced unedorsed candidates? Not only are they inhibited from qualifying, but in addition to the raw financial support under party rules from an endorsement, the candidates are presented with a situation where his or her filing fee required by State law, would be used to support his or her party opponent, who has been endorsed and hand picked by an Executive Committee, under official State sanction, prior to the candidates primary election.

In Broaderick v. Oklahoma, the Court explained that society has recognized and can tolerate certain limitations when balanced against State interests, to wit:

> "[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function,

> a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect--at best a prediction--cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. Alderman v. United States, 394 U.S. 165, 174-175, 89 S.Ct. 961, 966-967, 22 L.Ed.2d 176 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[Emphasis added].
>
> 413 U.S. at 615.

In the present circumstance, the State plainly has a compelling and legitimate interest to regulating its employees and

officials. The Petitioners submit that it is perfectly clear that the statute involves no intrusion whatsoever upon any personal freedom of any individual outside of his state position. Further, Executive Committees are not "persons", "groups", "corporations" or "orgainzations", but rather State Executive Committees are clearly financially and legally arms of the State of Florida. They are officials of the State and are subject to the present regulation by the State under Broaderick v. Oklahoma.

The trial court sua sponte virtually doubled the attorney's fees herein. The State complained bitterly in the District court that there was no justification for such abuse of discretion and noted such a circumstance in its brief and by pleading below. The State would request that this Court overturn the grant of attorney's fees as a patent abuse of discretion.

VII

CONCLUSION

Based upon the foregoing argument the Petitioners respectfully request that this Honorable Court take jurisdiction in this matter and reverse the United States District Court's order declaring Section 103.091 (6) Florida Statutes unconstitutional, and set aside the award of attorney's fees.

RESPECTFULLY SUBMITTED, on this ____ day of November, 1981, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
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Order of the United States Court of Appeals for the Fifth Circuit denying rehearing and rehearing en banc..... A31

Michael ABRAMS and Sergio Bendixen, on their own behalf and on behalf of all others similarly situated, Plaintiffs,

v.

Janet RENO, State Attorney, Eleventh Judicial Circuit Florida, Defendant.

No. 78-1473-CIV-WMH.

United States District Court, S. D. Florida.

May 10, 1978.

Bruce S. Rogow, Fort Lauderdale, Fla., Flynn Rubio & Tarkoff, Miami, Fla., Jacquelyn E. Steinberg, Fort Lauderdale, Fla., for plaintiffs.

William M. Grodnick, Asst. Atty. Gen., Paul Rashkind, Asst. State's Atty., Richard Jay Weiss. Asst. County Atty., Miami, Fla., for defendant.

MEMORANDUM OPINION

HOEVELER, District Judge.

On April 15, 1978, the first of four "mini-conventions" scheduled by the Dade County Democratic Executive Committee was to take place. Among other things, the conventions, organized on a"grass roots" level were for the purpose of agreeing on endorsements of candidates for uncontested seats in the Legislature from the several districts.

In what was described as considerable haste, Sec. 103.091(6), Florida Statutes (1978) was passed through both houses of the Florida Legislature emerging April 13, 1978.

In the early afternoon of April 14,1978, the Governor of Florida signed the statute and it became a viable law.

The chronology was not coincidental.

Section 103.091(6), Florida Statutes, provides:

(6) No state executive committee or county executive committee of any political party or any committee established by a state or county executive committee shall endorse or oppose any candidate of its political party seeking nomination in any primary election. Nothing herein shall prohibit an individual member of a state executive committee or an individual member of a county executive committee from independently endorsing or opposing a candidate of his political party seeking nomination in any primary election, provided that such endorsement shall in no way indicate the member's position on, or opposition with, a state or county executive committee.

Section 2. This bill shall take effect upon becoming a law.

The plaintiffs, Michael Abrams and Sergio Bendixen, both members of the Dade County Democratic Executive Committee filed suit in this Court immediately after the statute in question became effective. An emergency hearing was held during the late afternoon of April 14th at which the plaintiffs sought both declaratory and injunctive relief.

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1343(3), 28 U.S.C. § 1331 and the Declaratory Judgment Act, 28 U.S.C. § 2201.

The defendant, Janet Reno, as State Attorney, is charged with the enforcement of the criminal laws of the State of Florida within the Eleventh Judicial Circuit (Dade County). As the statute in question is penal in nature, with violations described as first degree misdemeanors,[1] the State Attorney was properly named. The Attorney General was notified of the hearing to be held on the 14th of April, but declined to appear, apparently on the basis of insufficient notice. Pursuant to later motion and order permitting intervention, the Attorney General is now a party to the action.

1. F.S. 104.051(2)

After the initial hearing (on April 14th) at which argument was presented by the plaintiffs and defendant, Janet Reno, and at which the testimony of the plaintiff, Abrams,was taken, a preliminary injunction was entered enjoining the enforcement of the Statute and postponing action with reference to the request for declaratory relief until the Attorney General of Florida had the opportunity to defend the constitutionality of the act.

On April 27, 1978, the Court heard additional argument on the issues presented, Counsel for plaintiffs and the Attorney General submitted memoranda prior to argument.

The Court had concluded, first, that this is not a proper situation for abstention and further granted that the declaratory relief should be granted.

At the time of the hearing on April 14th, no violation of the statute had occurred. As noted above, the legislation was only hours old. However, the "mini-conventions" organized by the Democratic Executive Committee were to begin the following morning. The Attorney General does not suggest that the timing of the statute was coincidental. He argues, that the Court should not consider the haste with which the bill found its way through the legislature. Rather, it is argued, the substantive validity or invalidity of the act is the proper question. This is true as to the prayer for declaratory relief. It is not as to the need for injunctive relief. The danger of violation and arrest was manifest if the planned endorsement procedures were carried out.

STANDARD OF REVIEW

While § 103.091(6) is initially favored with the presumption of constitutionality, this presumption can be dispelled, if as plaintiffs argue, the statute imposes a substantial burden upon and a significant interference with the plaintiffs' fundamental constitutional rights of speech, assembly and political association. Since the statute penalizes the endorsement of or opposition to any candidate in any primary election and thus imposes a direct prior restraint, there us little doubt that First Amendment values are affected. The legislation is, therefore, subject to strict scrutiny and will only be sustained if the State can show a compelling interest outweighing the plaintiffs competing federally protected rights.

Additionally, even if justification can be found in a compelling state interest, the means chosen to advance such interest must be sufficiently narrow so as to constitute the least intrusive alternative available.[2]

PRINCIPLES OF FEDERALISM

The State of Florida has urged abstention by this Court. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

2. See the recent case of First National Bank of Boston v. Bellotti, ___ U.S. ___, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978) where the Supreme Court noted, "where . . . a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling and the burden is on the government to show the existence of such an interest.' Even then, the State must employ means "closely drawn to avoid unnecessary abridgement . . .'" (citations omitted)

In Steffel v. Thompson, 415 U.S.452, 94 S.Ct. 1209, 39 L.Ed.2d 505, (1974), the Supreme Court approved Federal Declaratory Relief where no state prosecution is pending, but only threatened.[3] The Court in Steffel did not directly consider the appropriateness of injunctive releaf in cases where no prosecution was pending. However, the Court noted:

> "Even the Court of Appeals for the Fifth Circuit [in Jones v. Wade, 5th Cir. 1973, 470 F.2d 1176]

3. By stipulation, the State Attorney has admitted that it is her sworn duty to prosecute all violations of criminal statutes in the 11th Judicial Circuit. Further, the State Attorney refused in open court to agree that no prosecution under this statute was appropriate at the present time and in view of the nature of the mini conventions. Thus, the threat of prosecution was, in the judgment of the Court, real, immediate and genuine and not speculative or imaginery.

> has limited the scope of the instant decision [Younger] by entertaining an action for declaratory and injunctive relief in the absence of a state prosecution where the federal suit attacked the facial validity of a state statute rather than the validity of the statute as applied." Steffel, supra at 458 n.8, 94 S.Ct. at 1215.

This case involves the facial validity of the act in question since its enforcement was enjoined prior to the commencement of any prosecution under it.

The Steffel case also left open the question of whether a sufficient showing of irreparable injury was made [to justify Federal Injunctive relief] where, although no prosecution was pending, "an individual demonstrates that he will be required to forgo constitutionally protected activity in order to avoid arrest." (Supra at p. 463, n.12, 94 S.Ct. at p. 1218).

The apparently brief legislative history of the bill, occurring on the eve of the mini-conventions it was designed to emasculate, made sufficiently clear the danger of violation presented to plaintiffs and the others participating. The timing of the legislation was such that the plaintiffs would have been caused to withdraw on Saturday, April 15th, from engaging in constitutionally protected activities, which until approximately 1:30 p.m. the preceding day, had been legal and non-criminal. The State takes no serious issue with the Court's impression as to the immediate purpose for the legislation.

The plaintiff, Abrams, testified that the rescheduling of the conventions would result in a loss of over $25,000.00 to

the Dade Democratic Executive Committee. He also testified that it was his intention to individually endorse Democratic Party candidates seeking nominations in primaries and that he intended to indicate his position with the County Executive Committee (Chairman) when making his endorsements. He further testified that unless a determination was made by the Court that the act was unenforceable, he would refrain from making endorsements and would in his capacity as Chairman of the Dade County Democratic Committee, urge delegates to refrain also.[4]

4. The Court cannot determine whether or not any delegates would have refrained from assembling at the conventions for fear that an action by the group might invoke individual criminal liability. It is reasonable to surmise, however, that this enactment might have had a "chilling" effect on the delegates' constitutional protected right of assembly.

In Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), the Court held that a Federal plaintiff is not limited to declaratory relief where the threat of repeated future prosecutions was presented by the exercise of the plaintiffs' First Amendment rights. Injunctive relief preventing the further enforcement of a state criminal statute (where the plaintiff had already been subjected to three prosecutions) was approved by the Court. The plaintiff asserted his right to refrain from furthering or promoting the state slogan. with which he disagreed, and which was on his license plate (he repeatedly covered the slogan). The Court sustained his right and importantly (as to the instant case) approved the granting of injunctive relief where the threat of prosecution was real.

In the setting of the circumstances described and the genuine threat to the exercise of free speech and political association, this Court concludes that Younger principles do not apply and that it should not abstain.

THE BURDEN AND THE STATE INTEREST

It seems clear that the act in question imposes a direct prior restraint on the exercise of free speech--the right to endorse or

> action by the group might invoke individual criminal liability. It is reasonable to surmise, however that this enactment might have had a "chilling" effect on the delegates' constitutional protected right of assembly.

oppose; in sum, in the important right of free political expression. In other terms, a substantial burden on First Amendment rights is presented. The legislation interferes with the internal workings of political parties at the state and local levels. In Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, the Court stated:

> "the court's decisions in Mills v. Alabama, 384 U.S. 214 [86 S.Ct. 1434,] 46 L.Ed.2d 484 . . . and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, [94 S.Ct. 2831,] 41 L.Ed.2d 730 . . .,

> held that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment."

The Mills and Tornillo cases concern legislative restrictions placed on the media (in Mills, the right of a newspaper to endorse on the day of the election). This difference from the instant case is not material in principle. Section 103.091(6) imposes legislative restrictions on the content of political speech.

Further, there can be little question that the act is a legislative attempt to regulate the internal affairs of state and county political parties. The justification for this incursion is said to be the state election laws and the regulatory rights incident thereto. Without begging the question of the right of a political executive committee to exist and function without the breath of life

provided by the election code, it seems to be bootstrap reasoning to suggest that election code regulation permits the denial of substantial constitutional rights. Corporations are created and exist pursuant to state law. This genesis, however, does not provide the basis for the deprivation of the right of a corporation to speak on a public matter important to the corporation. First National Bank of Boston v. Bellotti, ___ U.S. ___, 98 S.Ct. 1407, 55 L.Ed.2d 707. In Bellotti the Court stated:

> "the press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate [citations omitted]. But the press does not have a monopoly on either the First Amendment or the ability to enlighten"

If we fail to carefully scrutinize legislation facility objectionable; if we permit, in the name of zealous and well in-

tended legislation, the subtle watering down of a complex of rights, we will, in time and perhaps too late, see the damage done by misguided restraint.

Even if the apparent impairment of the plaintiffs' interests in free expression resulting from the enforcement of the act does not present a case requiring the strictest constitutional scrutiny, the state should be required "to show a reasonable necessity" for requiring the legislation in question. Morial v. Judiciary Commission of the State of La., 565 F.2d 295 (5th Cir. 1977)

In the case of Ripon Society v. National Republican Party, 173 U.S.App. D.C. 350, 369, 525 F.2d 567, 586 (1975), the Court of Appeals commenting on the action of the Supreme Court, noted that the Court had ". . . placed the internal workings of a political party squarely

within the protection of the First Amendment." Against the framework of these strong First Amendment considerations, the state urges that it has a compelling interest in preserving "official neutrality" of party executive committees in primary elections. Fiscal integrity of the executive committees was also argued to sustain constitutionality. Emotionally appealing words such as "bossism" were suggested but no recommendations were presented as to lesser intrusive methods of achieving the ends apparently sought by the offending legislation. The state's reference to "Hatch Act" cases is not persuasive. The "balancing" presented in connection with such legislation has been found to militate in favor of it. The abuses there are not apparent here. In any event, the state's analogy of placing elected party offi-

cials in the same category as officials of the State Department of Administration is without merit. The public expects the latter to conduct the business of government without regard to political considerations. On the other hand, the very business of state and local party officials is politics.

The state interests presented by the Attorney General, including the unfortunate timing of the mini-conventions, are both legitimate and important. While the wisdom of some of the other procedures involved, including donations to successful endorsees may be questioned, it is not the court's responsibility or desire to enter into party procedures unless they bear importantly and decisively on the constitutional issue. It is the opinion of the Court that they do not.

While the act in question does serve the state interests referred to, it does so in an enveloping and "intrusive" manner and to such an extent that its constitutionally objectionable features outweigh the state interests.

The Court does not agree with a proposition that the same interests cannot be advanced by a far more narrowly drawn (and less intrusive) statute.

In any event, the Court does not find the asserted interests to be sufficiently compelling to outweight the plaintiffs' fundamental personal rights of free speech and political association, in view of the substantial burdens which would be imposed on plaintiffs by the statute. The suggestion by the state that no restriction is placed on "individual" speech both misses the mark and presents somewhat of an unintentional

absurdity, where a known party executive must, in some way, disclaim his official role.

CONCLUSION

Freedom of speech is a "fundamental personal" right Gitlow v. New York, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). The "checking value" of this right must be emphasized.[5] Historically, it is of interest to note James Madison's original draft formulation of what was to become the First Amendment.

"The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[6]

5. The Checking Value in First Amendment Theory, Vincent Blasi, American Bar Foundation Journal, Vol. 1977, Summer 3, P. 523.
6. Ibid P.537.

The Court should further note the "equal protection" problems spawned by the distinction drawn between classes of politically active persons. The position of the plaintiff, Bendixen, who is a Democratic National Committeeman, as well as a member of the state and local executive committees underscores the problem. In one capacity, he is inhibited by the act, in another, he is not.

In the opinion of the Court, there can be no more important pursuit than the most careful examination of any legislation which seeks to inhibit free political speech and association. Perhaps we are best instructed by the words of Justice Brandeis in Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095:

> "Those who won our independence believed that the final end of the state was to make men free to develop their

faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

It is the opinion and finding of the Court that Florida Statute 103.091(6) is unconstitutional. A status conference will be set to determine the further procedures to be taken in connection with this litigation.

Michael ABRAMS and Sergio Bendixen, Etc.,
Plaintiffs-Appellees,

v.

Janet RENO, Etc.,
Defendants-Appellants.

No. 79-1272.

United States Court of Appeals,
Fifth Circuit.

July 2, 1981.

Appeal from the United States District Court for the Southern District of Florida; Wm. M. Hoeveler, Judge.

Before GODBOLD, SIMPSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

Affirmed on the basis of the Memorandum Opinion of the district court, Abrams v. Reno, 452 F.Supp. 1166 (S.D.Fla. 1978).

THOMAS A. CLARK, Circuit Judge, specially concurring:

I write only to point out my understanding of the limited scope of the holding of the district court's opinion.

The district court held that whatever interests the state has that might in turn rise to the level of a compelling state interest could not be furthered by an overbroad statute that unnecessarily intrudes on the associational rights of the Dade County Democratic Party and its members, and with this holding I wholeheartedly agree. The opinion mentions in passing, however, practices which may or may not support a much more limited intrusion on the part of the state. Whether the party may make contributions to or incur expenses in behalf of a candidate for party nomination prior to nomination in that party's primary is a constitutional question involving party practices that have not been made an issue either in the lower court or on appeal. I wish to add only that, in the event that such practices do form the

basis of a complaint sometime in the future, "the wisdom of such procedures," 452 F.Supp. at 1171, may not be a matter solely for the party to decide. Qualifying fees that a dissident party member is compelled to pay the state in order to advance his candidacy in the party primary may be turned over to the party before the primary. See, e.g., F.S.A. §99.103. These funds may in turn be sufficiently imbued with the qualifying candidate's own political beliefs as to support the state's limited intervention in behalf of the candidate by prohibiting the party's using such funds in the primary campaign against one (dissident) candidate in favor of another (mainstream) candidate. Compare, e.g., Abood v. Detroit Board of Education, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (union may not require, as condition for

closed shop public employment job, contributions that it may then use to advance political causes to which employee objects). These are, of course, issues we do not decide. The issue in this case is the validity of a statute that is plainly overbroad on its face, and I can only agree that the judgment of the district court must be AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

NO. 79-1272

MICHAEL ABRAMS and SERGIO BENDIXEN, ETC.,

Plaintiffs-Appellees,

versus

JANET RENO, ETC.,

Defendant-Appellant.

- - - - -

Appeal from the United States District Court for the Southern District of Florida

- - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 7/2/81, 5 Cir., 198_, __F.2d__).

Before GODBOLD, Chief Judge, SIMPSON and CLARK, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the

Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1090

in the Supreme Court of the United States

October Term, 1981

JANET RENO, State Attorney and
JIM SMITH, Attorney General
Petitioners,

vs.

MICHAEL ABRAMS and SERGIO BENDIXEN, as members of the Democratic Executive Committee for Dade County, Florida,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

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ISSUE PRESENTED FOR REVIEW

DOES A STATE STATUTE WHICH TOTALLY PROHIBITS A POLITICAL PARTY COMMITTEE FROM ENDORSING A CANDIDATE IN A PARTY PRIMARY VIOLATE THE FIRST AMENDMENT'S GUARANTEES OF POLITICAL ASSOCIATION AND EXPRESSION?

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STATEMENT OF THE CASE

This case is not complicated. Florida enacted a statute which banned political parties, acting through any of their committees, from endorsing or opposing candidates in the party's primary election.[1]

The United States District Court for the Southern District of Florida declared the statute unconstitutional. *Abrams v. Reno*, 452 F. Supp. 1166 (S.D. Fla. 1978).

The United States Court of Appeals for the Fifth Circuit unanimously affirmed on the basis of the District Court decision. *Abrams v. Reno*, 649 F.2d 342 (5th Cir. 1981). One panel member specially concurred, noting that questions of party expenditures of funds to oppose a candidate, a matter not at issue in this case, may pose a more complex problem, but no question existed regarding the invalidity of the statute:

> The district court held that whatever interests the state has that might in turn rise to the

---

[1]The statute, §103.091(6), Fla. Stat. (1978) provided:

> No State Executive Committee or County Executive Committee of any political party or any committee established by a State or County Executive Committee shall endorse or oppose any candidate of its political party seeking nomination in any primary election. Nothing herein shall prohibit an individual member of a State Executive Committee or a County Executive Committee from independently endorsing or opposing a candidate of his political party seeking nomination in any primary election, provided that such endorsement shall in no way indicate the member's position on, or connection with, the State or County Executive Committee.

> level of a compelling state interest could not be furthered by an overbroad statute that unnecessarily intrudes on the associational rights of the Dade County Democratic Party and its members, and with this holding I wholeheartedly agree.

Id. 649 F.2d 342 (Clark, J., concurring)

The State seeks certiorari, asserting the District Court and the Court of Appeals were wrong and, although not saying so, apparently claiming conflict with *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

THE REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

None of the considerations governing review on certiorari are presented by this case. The crux of the State's position is its attempt to characterize members of State and County political party executive committees as "officials of the State [who] are subject to the present [§103.091(6)] regulation by the State under *Broadrick v. Oklahoma*." Petition for Writ of Certiorari, p. 21.

Broadrick upheld the validity of an Oklahoma statute which precluded employees "in the classified service" of the state from engaging in partisan political activity. *Broadrick*, 413 U.S. at 605.

Here, Florida claims that party political activists are "officials of the state" because state statutes require, inter alia, parties to "be represented by a state executive committee" which is authorized to establish "county executive committees and other committees". §103.091(1),

Fla. Stat. The State opines that these party officers thus have "an official state position", Petition at p. 17, which justifies limiting their First Amendment rights.

The argument is devoid of merit. It would mean that state and local party functionaries would be "acting under color of state law" and liable to suit under 42 U.S.C. §1983. Surely the State would not agree with that contention, yet its logic here supports it. Even if party officials were viewed like civil service employees of state administrative agencies, the *Broadrick* rationale would not support the statutory restrictions on constitutional rights. The District Court wrote:

> [T]he State's analogy of placing elected party officials in the same category as officials of the State Department of Administration is without merit. The public expects the latter to conduct the business of government without regard to political considerations. On the other hand, the very business of state and local party officials is politics.
>
> *Abrams v. Reno*, 452 F.Supp. 1166, 1170 (S.D. Fla. 1978)

The State's cries of "integrity of the primary system" (p. 14), "political bossism" (p. 16), "chilling effect upon any other candidate" (p. 18) add nothing to its position. As long as qualified voters may vote in their party's primaries, and may speak in favor of or against any primary candidate, the integrity of the electoral process is safe. Endorsement of a primary candidate by a political party, or one of its officials, poses no harm to the voters. They are free to choose among the candidates

and base their decision on information obtained from a variety of sources. Indeed, the voters may reject the recommendations of their party or its officials and voice their dissatisfaction with party leadership. A candidate may run on a platform opposing the party leadership. The First Amendment and the political process are designed to protect just those kinds of freedom of expression.

The First Amendment also protects the freedom of expression and internal workings of a political party. *Cousins v. Wigoda*, 419 U.S. 477, 487-488 (1975). The decision below in this case is consistent with the First Amendment and the decisions applying it to political association and expression. It is not inconsistent with any decision of this Court, nor does it present any important and unanswered question of federal law.

No argument was advanced by the State to support its conclusionary request to set aside the attorney's fee award entered by the District Court. See Petition p. 22. We note that the sum was modest ($4,000); the order complied with the Fifth Circuit requirement for specific findings of fact under *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); and in the Court of Appeals the State's Brief presented and argued only one issue: "Whether The District Court Erred In Ruling That Section 103.091(6), Florida Statutes (1978) Is Unconstitutional On Its Face?" State's Brief in Fifth Circuit, p. 2.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Brief of Respondents in Opposition to Certiorari was furnished by mail to CALVIN L. FOX, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, this day of February, 1982.

BRUCE ROGOW